

**United States Department of Labor
Employees' Compensation Appeals Board**

G.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Eastman, GA, Employer**

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**Docket No. 17-0140
Issued: April 13, 2017**

Appearances:

Victor A. Walker, for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 27, 2016 appellant, through her representative, filed a timely appeal from an October 11, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective April 13, 2016 under 20 C.F.R. § 10.500(a) based on her earnings had she accepted a temporary light-duty assignment.

FACTUAL HISTORY

On August 20, 2014 appellant, then a 49-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she injured a disc in her back due to factors of her federal employment. She stopped work on July 15, 2014. OWCP accepted the claim for intervertebral disc disorder with myelopathy of the lumbar region and thoracic or lumbosacral neuritis or radiculitis. It paid compensation for total disability beginning July 26, 2014 and placed her on the periodic rolls beginning December 14, 2014.

Appellant, on August 14, 2014, underwent a posterior lumbar fusion, discectomy, and decompression at L4-5.

In a progress report dated May 20, 2015, Dr. William W. Brooks, an attending Board-certified orthopedic surgeon, discussed appellant's complaints of radiculopathy on the left side following surgery. He diagnosed low back pain, lumbosacral radiculopathy, and "angry back syndrome" or lumbago. Dr. Brooks advised that appellant was unable to work pending diagnostic studies. A computerized tomography (CT) scan obtained June 19, 2015 showed a left annular bulge at L3-4.

OWCP referred appellant to Dr. Douglas P. Hein, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated August 5, 2015, Dr. Hein discussed her history of prior work injuries in 2012 and 2014 and reviewed the results of diagnostic studies. He diagnosed degenerative disc disease following surgery at L4-5 without significant improvement. Dr. Hein found that appellant's herniated disc had resolved, but that she had continued lumbar radiculopathy with reduced strength and objective evidence of disc abnormalities. He advised that she had not yet reached maximum medical improvement and was "capable of only light and occasional moderate physical activities...." In an August 15, 2015 work restriction evaluation, Dr. Hein found that appellant could not perform her regular employment because of her restrictions on lifting and walking, but could work eight hours per day in a sedentary or light capacity. He provided limitations of sitting and standing for four hours per day, walking for two hours per day, operating a motor vehicle at work for two hours per day, and pushing, pulling, and lifting up to 20 pounds for two hours per day. Dr. Hein advised that appellant could not squat, kneel, or climb.

Dr. Brooks, in an August 6, 2015 progress report, diagnosed lumbago, sciatica, lumbosacral radiculopathy, and a prolapsed lumbar intervertebral disc. He noted that appellant was currently undergoing treatment for breast cancer and found that she was "out of work."

On September 3, 2015 Dr. Brooks evaluated appellant for radiculopathy of the left leg. He provided examination findings and indicated that he agreed with the finding of the second opinion physician that she was not at maximum medical improvement. Dr. Brooks opined that

appellant could work at a sedentary rather than moderate level with no bending, twisting, or lifting. He noted that her cancer had resulted in delayed treatment of her back.³ Dr. Brooks, on January 11, 2016, found that appellant should remain off work pending a functional capacity evaluation (FCE).

The employing establishment, on January 19, 2016, offered appellant a position as a modified city carrier for four hours per day. The duties of the position included casing mail for one and a half hours per day, delivering a route for two hours per day, and working on a machine for a half hour per day. It required lifting, pushing, and pulling up to 20 pounds for two hours per day, operating a motor vehicle at work for no more than two hours per day, and no squatting, kneeling, or climbing. The position also indicated that it involved no walking over two hours or standing over four hours, and advised that appellant would drive a vehicle to deliver mail, dismount from the vehicle, and walk to indoor and side mail boxes. She would also perform seated deliveries that required her to “turn to the left to gather mail and back to the right to reach thr[ough] the open vehicle window to open a mailbox and place the mail in the box and close the lid.” The employing establishment advised that due to appellant’s physical limitations and its work load it could not provide a full-time offer.

Appellant accepted the position subject to her physician’s approval.

An FCE performed February 5, 2016 indicated that appellant could work at a light level for four to six hours per day. The physical therapist who performed the evaluation found that appellant could work six hours per day lifting and carrying up to 25 pounds, pushing carts up to 35 pounds, pulling with one arm up to 40 pounds, and infrequently climbing stairs. Appellant described the duties of the offered limited-duty position and the physical therapist found that she could work in the position six hours per day. He further indicated that she could infrequently climb stairs. The physical therapist further advised that the results of the FCE were not valid and that her demonstrated work ability was “very conservative.”

In an undated work restriction evaluation (Form OWCP-5c), Dr. Brooks found that appellant could work four to six hours per day with reconditioning prior to working full time. He determined that she could walk two to four hours per day, stand one to two hours per day, push and pull 35 to 40 pounds, and lift up to 25 pounds. Dr. Brooks indicated that appellant could not twist or squat, could kneel 5 to 10 minutes, bend and stoop 5 to 10 minutes, and could climb 10 to 30 minutes.

OWCP, in a notice dated February 17, 2016, informed appellant of its proposed reduction of her compensation as the employing establishment had offered a temporary position as a part-time modified city carrier that accommodated her work-related limitations. It advised her of the provisions of 20 C.F.R. § 10.500(a) and discussed that compensation was only available while her wages precluded her from earning the same wages as before her injury. OWCP afforded appellant 30 days to accept the temporary position or provide good cause for not doing so.

Dr. Brooks submitted a February 18, 2016 work restriction evaluation that was identical to the undated work restriction evaluation received by OWCP on February 16, 2016.

³ Dr. Brooks continued to provide progress reports describing his treatment of appellant.

By letter dated February 29, 2016, appellant asserted that she was unable to accept the modified position because the FCE found that she could not perform twisting.

In a February 26, 2015 progress report, Dr. Brooks diagnosed postlaminectomy syndrome, listed findings on examination, and found that appellant could perform limited-duty employment as per the FCE.

By decision dated April 13, 2016, OWCP reduced appellant's wage-loss compensation effective that date as she did not accept the light-duty position offered on January 19, 2016 by the employing establishment.⁴ It applied the formula set forth in *Albert C. Shadrick*⁵ to calculate her loss of wage-earning capacity.

In a report dated June 2, 2016, Dr. Jeremy Prine, a Board-certified anesthesiologist, evaluated appellant for low back pain with radiculopathy into the right hip and left leg. He advised that appellant had been referred to him by Dr. Brooks for treatment. Dr. Prine diagnosed lumbosacral radiculopathy and long-term opiate use. He provided pain management. Dr. Prine continued to submit progress reports describing his treatment of appellant from June through August 2016.

Appellant also resubmitted progress reports from Dr. Brooks from March 2015 to March 2016.

On August 2, 2016 appellant, through her representative, requested reconsideration. He noted that appellant had declined the position based on poor advice from a union representative. The representative asserted that a conflict existed between Drs. Hein and Brooks regarding whether appellant could perform twisting, necessitating referral to an impartial medical examiner. He further maintained that the job was not within Dr. Hein's restrictions as he found that appellant could not climb, and her job description involved climbing. The representative advised that she would have to go up the stairs in front of houses to deliver mail.

By decision dated October 11, 2016, OWCP denied modification of its April 13, 2016 decision. It found that the medical evidence of record established that appellant was capable of performing the offered modified city carrier position and that she did not provide an adequate reason for refusing the position.

On appeal appellant, through her representative, contends that Dr. Hein found that she could perform no climbing, but in performing the offered position she would need to climb stairs to deliver mail. The representative noted that the physician reviewed her date-of-injury position that required climbing and that the position was not suitable as it was temporary. The representative also asserts that OWCP did not advise appellant that her reasons for refusing the

⁴ In a decision dated April 29, 2016, OWCP found an overpayment of compensation in the amount of \$799.74 because insufficient life insurance premiums had been deducted. It found that she was without fault in creation of the overpayment but denied waiver of recovery. Appellant did not appeal this decision.

⁵ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

position were not suitable or provide her with 15 days to accept the position or have her compensation terminated after it found the position suitable, citing *Maggie Moore*.⁶

LEGAL PRECEDENT

Section 10.500(a) of the Code of Federal Regulations provides:

“(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents [her] from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage loss claimed on a [Form] CA-7 to the extent that evidence contemporaneous with the period claimed on a [Form] CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing [establishment] had offered, in accordance with OWCP procedures, a temporary light-duty assignment within the employee’s work restrictions.”⁷

When it is determined that an appellant is no longer totally disabled from work and is on the periodic rolls, OWCP procedures provide that the claims examiner should evaluate whether the evidence establishes that light-duty work was available within her restrictions. The claims examiner should provide a pretermination or prereduction notice if appellant is being removed from the periodic rolls.⁸ When the light-duty assignment either ends or is no longer available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.⁹

OWCP procedures further advise, “If there would have been wage loss if the claimant had accepted the light-duty assignment, the claimant remains entitled to compensation benefits based on the temporary actual earnings WEC [wage-earning capacity] calculation (just as if he/she had accepted the light-duty assignment).”¹⁰

A part-time light-duty assignment may be appropriate if it is for at least half of the total hours that the claimant was released for work, is not less than two hours per day, and there is

⁶ 42 ECAB 484 (1991), *reaff’d on recon.*, 43 ECAB 818 (1992).

⁷ 20 C.F.R. § 10.500(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9(c)(1) (June 2013).

⁹ *Id.*

¹⁰ *Id.* at Chapter 2.814.8(c)(10).

written verification from the employing establishment verifying that it is not able to provide work for the total hours that the claimant was released for work.¹¹

ANALYSIS

OWCP accepted that appellant sustained lumbar intervertebral disc disorder with myelopathy and thoracic or lumbosacral neuritis or radiculitis causally related to factors of her federal employment. It paid her compensation for total disability beginning July 26, 2014. OWCP placed her on the periodic rolls effective December 14, 2014. On August 14, 2014 appellant underwent a lumbar fusion, discectomy, and decompression at L4-5.

On January 19, 2016 the employing establishment offered appellant a position as a modified carrier working four hours per day. The position required casing mail for one and a half hours per day, delivering mail for two hours per day, and working on a machine for a half hour per day. The physical requirements consisted of walking no more than two hours, standing no more than four hours, lifting, pushing, or pulling up to two hours, operating a motor vehicle for no more than two hours, and no squatting, kneeling, or climbing. It also required driving a vehicle to deliver mail, getting out of the vehicle to deliver mail to indoor and side mailboxes, and performing seated deliveries that required turning.

The determination of whether an employee has the physical ability to perform a position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.¹² In his August 5, 2015 report, Dr. Hein found that appellant had no residuals of her herniated disc, but that she did have lumbar radiculopathy, reduced strength, and evidence of disc abnormalities on objective testing. He found that she had not reached maximum medical improvement and was unable to perform her usual job, but that she could perform sedentary or light work for eight hours a day. Dr. Hein advised that appellant could sit and stand for four hours per day, walk for two hours per day, operate a motor vehicle at work for two hours per day, and push, pull, and lift up to 20 pounds for two hours per day. His report, which is detailed and well rationalized, is entitled to the weight of the evidence and establishes that she has the ability to perform the offered modified employment.¹³

In the progress report dated August 6, 2015, Dr. Brooks diagnosed a prolapsed lumbar intervertebral disc, lumbosacral radiculopathy, sciatica, and lumbago. He found that appellant was out of work, noting that she was undergoing treatment for breast cancer. Dr. Brooks, however, did not provide rationale in support of his disability finding or specifically attribute the disability to the work injury, and thus his report is of little probative value.¹⁴

On September 3, 2015 Dr. Brooks reviewed the opinion of the second opinion examiner, Dr. Hein, and opined that appellant could perform sedentary work with no bending, twisting, or

¹¹ *Id.* at Chapter 2.814.9(d).

¹² *See N.D.*, Docket No. 15-0027 (issued February 4, 2016); *T.T.*, 58 ECAB 296 (2007).

¹³ *See generally H.Y.*, Docket No. 14-0019 (issued March 24, 2014).

¹⁴ *K.W.*, 59 ECAB 271 (2007).

lifting. On January 11, 2016 he advised that she should not work until after an FCE. An FCE performed February 5, 2015 indicated that appellant could perform light work for six hours per day lifting up to 25 pounds and infrequently climbing stairs. The physical therapist who performed the evaluation advised that she could work in the offered limited-duty position for six hours per day. In a work restriction evaluation received February 16, 2016, Dr. Brooks found that appellant could work four to six hours per day walking up to four hours, standing up to two hours, pushing and pulling up to 40 pounds, and lifting up to 25 pounds. He opined that she could not twist or squat, kneel, bend, or stoop more than 10 minutes, or climb more than 30 minutes. On February 26, 2016 Dr. Brooks found that appellant could perform limited duty in accordance with the FCE. As the FCE supports that she was able to work in the offered position, his reports do not support that the light-duty offered position was outside of her physical capacity.

The Board finds that OWCP complied with all procedural requirements as set forth in 20 C.F.R. § 10.500(a) by advising appellant that the offered assignment was suitable, providing her with the opportunity to accept the position or provide reasons for her refusal, and notifying her that her wage-loss compensation would be reduced if she failed to submit sufficient evidence showing that such reduction was not justified.¹⁵ The Board further finds that no procedural requirements beyond those set forth in 20 C.F.R. § 10.500(a) need be afforded to appellant prior to reduction of her benefits.¹⁶ OWCP properly applied the provisions of *Shadrick* in determining her loss of wage-earning capacity.¹⁷ The offered position was for four hours per day and the employing establishment verified that it was unable to provide a job offer for more hours per day due to its work load.¹⁸

The remaining evidence of record is insufficient to contradict that appellant had the capacity to perform the offered limited-duty position. On June 2, 2016 Dr. Prine diagnosed lumbosacral radiculopathy and opiate use. He noted that her pain started after a work injury and that she had undergone a fusion.¹⁹ Progress reports dated June through August 2016 describe his treatment of appellant with pain management. Dr. Prine, however, did not address the relevant issue of whether she could perform the offered modified-duty employment for four hours daily, and thus his opinion is of little probative value.

On appeal appellant's representative argues that Dr. Hein found that she could not climb and the offered position required her to climb stairs delivering mail. The job offer specified,

¹⁵ See *supra* note 8.

¹⁶ P.A., Docket No. 16-0768 (issued June 27, 2016).

¹⁷ See *supra* note 6. OWCP divided appellant's employment capacity to earn wages of \$575.57 a week by the current pay rate of the position held when injured of \$1,151.00 per week to find 50 percent wage-earning capacity. OWCP multiplied the pay rate at the time disability began of \$1,100.37 by the 50 percent wage-earning capacity percentage. The resulting amount of \$550.18 was subtracted from appellant's date-of-injury pay rate of \$1,100.37 which provided a loss of wage-earning capacity of \$550.19 per week. OWCP then multiplied this amount by the appropriate compensation rate which yielded \$366.79 or \$1,467.17 every four weeks after adjustments.

¹⁸ See *supra* note 12.

¹⁹ A June 19, 2016 CT scan showed an annular bulge at L4-5 that was not present on a 2014 MRI scan.

however, that she would deliver mail to indoor and side mail boxes and that the position required no climbing.

Appellant's representative also contends that the position was not suitable as it was temporary. He further notes that OWCP did not provide her with 15 days to accept the position or have her compensation terminated after it found the position suitable. OWCP, however, did not invoke the penalty provision of 5 U.S.C. § 8106(c) and terminate appellant's compensation for refusing suitable work, but instead reduced her wage-loss compensation under 20 C.F.R. § 10.500(a). As discussed, it complied with the procedural requirements prior to the reduction. A reduction of compensation based on a temporary position is allowed under section 10.500(a).²⁰ The evidence reflects that appellant did not accept a temporary light-duty assignment offered by the employing establishment that was within her physical capabilities and, therefore, OWCP properly reduced her compensation under section 10.500(a).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective April 13, 2016 based on her earnings had she accepted a temporary light-duty assignment.

²⁰ B.W., Docket No. 16-0120 (issued July 22, 2016).

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 13, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board